Ramal Properties Sdn Bhd v East West-UMI Insurance Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–25 OF 1996
KAMALANATHAN RATNAM JC
22 APRIL 1997

Contract *— Guarantee — Performance bond — On demand performance bond — Whether guarantor required to pay on demand — Whether letter of demand must be made in any particular form of words — Whether letter of demand must request guarantor to pay within specified time — Whether guarantor must be given reasonable time to meet its obligation*

Contract *— Guarantee — Performance bond — Liability under performance bond — Waiver of — Defendant guaranteed due performance by subcontractor — Breach of building contract by subcontractor — Subcontractor given extension of time under supplemental agreement — Whether supplemental agreement constitute a waive which would entitle defendant to escape liability under performance bond*

Civil Procedure *— Res judicata — Earlier action withdrawn before any argument or decision — Whether plaintiff barred from filing subsequent action*

The plaintiff was the owner of a project. Pembinaan Gedong Sdn Bhd ('Gedong') and Ingeback (M) Sdn Bhd ('Ingeback') were engaged as contractor and subcontractor respectively. The defendant entered into a performance bond with the plaintiff and Gedong to guarantee the due performance of the construction by Ingeback ('the performance bond'). Based on this, Gedong entered into a building contract with Ingeback for the construction of the project. Meanwhile, Gedong entered into a deed of assignment with the plaintiff whereby Gedong absolutely assigned its rights to receive from the defendant all monies payable under the performance bond. Ingeback breached the provisions of the building contract. Gedong therefore terminated the building contract ('the first breach'). The plaintiff and Gedong then by way of their solicitors' letter dated 23 April 1990 made a claim against the defendant on the performance bond.

Ingeback made an application through a writ of summons D5–22–1025–1990 ('the 1025–90 suit') to obtain an injunction to restrain the defendant from paying out on the performance bond which was granted on 6 July 1990. The plaintiff intervened in the 1025–90 suit. Subsequently, Ingeback withdrew the 1025–90 suit with the consent of the plaintiff and Gedong.

The parties then wish to complete the project and Gedong entered into an agreement with Ingeback ('the supplemental agreement') whereby Ingeback was allowed to recommence work in the project as subcontractor. In spite of extensions given, Ingeback was unable to complete the project.

The plaintiff claimed from the defendant under the performance contract by way of its letter dated 23 April 1990 because of the breach by Ingeback of the terms of the building contract which

resulted in the termination of the contract. The defendant filed an application to strike out the plaintiff's claim on several grounds: (i) the letter dated 23 April 1990 only constituted a mere notification and not a demand; that a letter of demand must request the guarantor to pay within specified time and a guarantor must be given reasonable time to meet its obligation; (ii) res judicata and estoppel — by consenting to the withdrawal of the 1025–90 suit which action was based on the same claim as the present suit, the plaintiff had relinquished its claim against the defendant and was therefore estopped from filing the same claim against the defendant by way of this present action; and (iii) the claim on the guarantee was bad as the guarantee had lapsed — by entering into the supplemental agreement, the plaintiff had waived the first breach. Having waived the first breach and having reinstated Ingeback as the contractor, the demand on the guarantee for the first breach upon the defendant had lapsed. The application was dismissed by the senior assistant registrar. The defendant appealed.

Held, dismissing the appeal:

(1) Clause 2(i) of the performance bond rendered the performance bond an on-demand performance bond which was only conditional upon the beneficiary asserting the basis of the claim upon the issuer of the bond contending that there had been a breach of contract. Upon such a demand being made, the liability of the defendant to pay under the performance bond was immediately attracted. Therefore, the defendant's contention that the letter dated 23 April 1990 only constituted a mere notification and not a demand was rejected (see p 243D–E); *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546 and *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449 followed.

There was no necessity to request the guarantor in the letter of demand to pay within a specified time. Once a demand has been served, the beneficiary should give a reasonable time to the guarantor to meet the obligation. The defendant had been given a reasonable time to meet its obligations. The defendant could have paid the monies so demanded by the letter dated 23 April 1990, at any time after that and up till 6 July 1990 when the injunction to stop the defendant from paying out on the performance bond was granted to Ingeback. The defendant had more than two months to make payment but it did not do so (see pp 243I and 244A–C); *United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 50 distinguished.

(2) The performance bond provided that the defendant was not discharged/released from the bond by the reinstatement of Ingeback as the subcontractor for the project. A release of the principal debtor by the creditor will not discharge the surety if he has expressly agreed to remain liable, so that there is then no

ground for the presumption that he is impliedly discharged. The liability of the defendant had already accrued since 23 April 1990 when the letter of demand was issued and the breach was in the end not remedied by the defendant, notwithstanding the supplemental agreement. As a result, the entry of Ingeback and Gedong into the supplemental agreement did not constitute a waive which would entitle the defendant to escape liability under the performance bond (see pp 245A and 248C–H); *Perry v National Provincial Bank of England* [1910] 1 Ch 464, *Cowper v Smith* (1838) 150 ER 1534, *Union Bank of Manchester v Beech* (1865) 159 ER 695 and *Bank of Adelaide v Lorden* (1971–72) 127 CLR 185 followed; *Commercial Bank of Tasmania v Jones* [1893] AC 313 not followed.

Further, the supplemental agreement was between Ingeback and Gedong. The plaintiff was not a party to the supplemental agreement and the terms thereof should not bind the plaintiff and having divested itself beneficially of the right to claim under the performance bond, Gedong's acts could not possibly affect the right of the plaintiff to claim under the performance bond from the defendant. In addition, the terms of the supplemental agreement itself showed that there was no waiver of the breach (see pp 248I and 249A–B).

(3) Although the plaintiff had consented to the defendant withdrawing the earlier suit, the discontinuance of an action or the withdrawal of part of a claim without leave is no bar to a subsequent action for the same cause of action. The effect is the same where the discontinuance is with leave, unless the order giving the leave expressly prohibits the commencement of a fresh action. The plaintiff may therefore commence a new action for the same cause, to which such discontinuance will be no defence; but unless he does so in good time, his laches may be a bar. The plaintiff herein filed this present suit five days after the withdrawal of the 1025–90 suit. As such, laches was not an issue. Further, this court did not prohibit the plaintiff from filing afresh.

In any case, it was crystal clear that the merits of the plaintiff's claim were never considered and decided upon by the court in the earlier suit and that there was never a final decision in respect of the merits of the plaintiff's case against the defendant. The existence of a previous judgment is the very essence, and sine qua non of the doctrine of res judicata. Without a previous judgment on the merits of the cause of action or issue, there is simply no res judicata, for 'res' simply means 'a thing' and 'judicata' means 'adjudicated'. Having held that res judicata could not apply to the instant case, it followed therefore that the plea of estoppel must perforce equally fail (see pp 249I and 250A–C, E–G).

Obiter:

Notwithstanding the fact that s 87 of the Contracts Act 1950 states that a surety is discharged by any contract between the creditor and

the principal debtor by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor, yet in practice, the effect of this section is rendered nugatory by the use of other clauses designed to preserve the surety's liability despite the release of the principal debtor in contracts or guarantee (see p 248F–G).

[Bahasa Malaysia summary

Plaintif adalah pemilik suatu projek. Pembinaan Gedong Sdn Bhd ('Gedong') dan Ingeback (M) Sdn Bhd ('Ingeback') telah digaji sebagai kontraktor dan sub-kontraktor masing-masing. Defendan telah mengikat suatu bon pelaksanaan dengan plaintif dan Gedong untuk menjamin pelaksanaan pembinaan oleh Ingeback ('bon pelaksanaan tersebut'). Berdasarkan ini, Gedong telah mengikat kontrak pembinaan dengan Ingeback untuk pembinaan projek tersebut. Sementara itu, Gedong telah mengikat suratikatan penyerahhakan dengan plaintif di mana Gedong telah menyerahhak secara mutlak kesemua hak untuk menerima daripada defendan segala wang yang harus dibayar di bawah bon pelaksanaan tersebut. Ingeback memungkir peruntukan kontrak pembinaan. Dengan itu Gedong menamatkan kontrak pembinaan ('kemungkiran pertama'). Plaintif dan Gedong menerusi surat peguamcara mereka bertarikh 23 April 1990 kemudiannya membuat tuntutan defendan atas bon pelaksanaan tersebut.

Ingeback membuat permohonan melalui writ saman D5–22–1025–1990 ('guaman 1025–90') untuk memperolehi suatu injunksi bagi menahan defendan daripada membayar bon pelaksanaan tersebut yang diberikan pada 6 Julai 1990. Plaintif telah mencelah dalam guaman 1025–90. Berikutnya, Ingeback menarik balik guaman 1025–90 dengan izin plaintif dan Gedong.

Pihak-pihak kemudiannya ingin menyelesaikan projek tersebut dan Gedong mengikat suatu perjanjian dengan Ingeback ('perjanjian tambahan') yang mana Ingeback dibenarkan memulakan kerja semula dalam projek tersebut sebagai subkontraktor. Meskipun pelanjutan yang diberikan, Ingeback tidak dapat menyelesaikan projek tersebut.

Plaintif menuntut daripada defendan di bawah kontrak pelaksanaan menerusi suratnya bertarikh 23 April 1990 disebabkan kemungkiran oleh Ingeback atas terma kontrak pembinaan yang mengakibatkan penamatan kontrak. Defendan memfailkan suatu permohonan untuk membatalkan tuntutan plaintif atas beberapa alasan: (i) surat bertarikh 23 April 1990 hanya membentuk suatu pemberitahuan dan bukan tuntutan; bahawa suatu surat tuntutan mestilah meminta penggerenti membayar dalam tempoh yang ditetapkan dan seseorang penggerenti mestilah diberikan masa yang munasabah untuk memenuhi obligasinya; (ii) res judicata dan estopel — dengan menyetujui penarikan balik guaman 1025–90 yang tindakannya adalah berdasarkan tuntutan yang sama dalam guaman ini, plaintif telah meninggalkan tuntutannya terhadap defendan dan dengan itu diestop daripada memfailkan tuntutan yang sama terhadap

defendan melalui tindakan ini; dan (iii) tuntutan atas gerenti adalah tidak elok kerana gerenti telah luput — dengan mengikat perjanjian tambahan, plaintif telah mengenepikan kemungkiran pertama. Setelah mengenepikan kemungkiran pertama dan mengembalikan Ingeback sebagai kontraktor, tuntutan atas gerenti untuk kemungkiran pertama telah luput. Permohonan ditolak oleh penolong kanan pendaftar. Defendan merayu.

Diputuskan, menolak rayuan:

(1) Fasal 2(i) bon pelaksanaan tersebut menjadikan bon itu suatu bon pelaksanaan 'atas tuntutan' yang hanya bersyarat atas penegasan asas tuntutan oleh benefisiari atas dasar tuntutan apabila pengeluar bon berhujah bahawa terdapat kemungkiran kontrak. Apabila tuntutan demikian dibuat, liabiliti defendan untuk membayar di bawah bon pelaksanaan tersebut membangkit dengan segera. Maka, hujah defendan bahawa surat bertarikh 23 April 1990 cuma membentuk suatu pemberitahuan dan bukan tuntutan ditolak (lihat ms 243D–E); *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546 dan *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449 diikut.

Tiada keperluan untuk meminta penggerenti dalam surat tuntutan supaya membayar dalam tempoh yang ditetapkan. Sebaik sahaja tuntutan disampaikan, benefisiari patut memberi masa yang munasabah kepada penggerenti untuk memenuhi obligasi. Defendan telah diberikan masa yang munasabah untuk memenuhi obligasinya. Defendan boleh membayar jumlah yang dituntut oleh surat bertarikh 23 April 1990, pada bila-bila masa selepas itu dan sehingga 6 Julai 1990 apabila injunksi untuk mencegah defendan daripada membuat bayaran atas bon pelaksanaan diberikan kepada Ingeback. Defendan mempunyai masa lebih daripada dua bulan untuk membuat bayaran tetapi ia tidak berbuat demikian (lihat ms 243I dan 244A–C); *United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 50 dibeza.

(2) Bon pelaksanaan tersebut memperuntukkan bahawa defendan tidak dilepaskan/dibebaskan daripada bon itu melalui pengembalian kedudukan Ingeback sebagai subkontraktor untuk projek tersebut. Suatu pembebasan penghutang utama oleh si piutang tidak melepaskan penjamin sekiranya beliau telah bersetuju kekal bertanggungjawab, supaya kemudiannya tiada alasan untuk anggapan bahawa beliau dilepaskan secara tersirat. Liabiliti defendan telah pun terakru sejak 23 April 1990 apabila surat tuntutan dikeluarkan dan kemungkiran akhirnya tidak dipulihkan oleh defendan, tanpa mengira perjanjian tambahan. Akibatnya, kemasukan Ingeback dan Gedong kepada perjanjian tambahan tidak boleh membentuk penepian yang akan membolehkan defendan melepaskan diri daripada liabiliti di bawah bon pelaksanaan tersebut (lihat ms 245A dan 248C–H); *Perry v National Provincial Bank of England* [1910] 1 Ch 464,

Cowper v Smith (1838) 150 ER 1534, *Union Bank of Manchester v Beech* (1865) 159 ER 695 dan *Bank of Adelaide v Lorden* (1971–72) 127 CLR 185 diikut; *Commercial Bank of Tasmania v Jones* [1893] AC 313 tidak diikut.

Selanjutnya, perjanjian tambahan adalah di antara Ingeback dan Gedong. Plaintif tidak merupakan suatu pihak kepada perjanjian tambahan dan terma dalamnya tidak harus mengikat plaintif dan setelah meletakhak dirinya secara benefisial atas hak menuntut di bawah bon pelaksanaan tersebut, perbuatan Gedong tidak mungkin menjejaskan hak plaintif untuk menuntut di bawah bon pelaksanaan daripada defendan. Tambahan pula, terma perjanjian tambahan sendiri menunjukkan bahawa tidak terdapat penepian kemungkiran (lihat ms 248I dan 249A–B).

(3) Walaupun plaintif teleh menyetujui penarikan balik tindakan yang lebih awal oleh defendan, penghentian sesuatu tindakan atau penarikan balik sebahagian daripada tuntutan tanpa kebenaran tidak menghalang tindakan berikutnya untuk kausa tindakan yang sama. Kesannya adalah sama di mana penghentian adalah dengan kebenaran, melainkan perintah yang memberikan kebenaran melarang permulaan tindakan baru secara nyata. Dengan itu plaintif boleh memulakan tindakan baru untuk kausa yang sama, yang mana penghentian sebegitu tidak menjadi pembelaan; tetapi melainkan dia berbuat demikian dalam tempoh, kelewatannya mungkin menjadi penghalang. Plaintif di sini memfailkan guaman ini lima hari selepas penarikan balik guaman 1025–90. Oleh itu, kelewatan bukanlah suatu isu. Seterusnya, mahkamah ini tidak melarang plaintif daripada memfailkan tindakan baru.

Walau bagaimanapun, adalah amat jelas bahawa merit tuntutan plaintif tidak sekali-kali dipertimbangkan dan diputuskan oleh mahkamah dalam guaman yang lebih awal dan bahawa tidak sekali-kali terdapat keputusan muktamad berkenaan dengan merit kes plaintif terhadap defendan. Kewujudan penghakiman yang lebih awal adalah intipati dan sine qua non doktrin res judicata. Tanpa penghakiman yang lebih awal atas merit kausa tindakan atau isu, tiadanya res judicata, kerana 'res' bermaksud 'sesuatu benda' dan 'judicata' bermaksud 'yang dihakimi'. Setelah memutuskan bahawa res judicata tidak terpakai kepada kes ini, ia bermakna bahawa hujah estopel mestilah gagal dalam cara yang sama (lihat ms 249I dan 250A–C, E–G).

Obiter:

Walaupun s 87 Akta Kontrak 1950 menyatakan bahawa penjamin adalah diperlepaskan oleh sebarang kontrak di antara si piutang dan si penghutang utama dengan mana si penghutang utama dilepaskan, atau oleh sebarang perbuatan atau peninggalan si piutang, yang akibatnya di sisi undang-undang ialah pelepasan si penghutang utama, namun dalam amalan, kesan seksyen ini dijadikan tidak berguna oleh

penggunaan fasal lain yang bertujuan mengekalkan liabiliti penjamin meskipun penghutang utama dalam kontrak atau gerenti dilepaskan (lihat ms 248F–G).]

Notes

For a case on performance bond, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1708.

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2892–2939.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Bank of Adelaide v Lorden (1971–72) 127 CLR 185 (folld)

Commercial Bank of Tasmania v Jones [1893] AC 313 (not folld)

Cowper v Smith (1838) 150 ER 1534 (folld)

Esal (Commodities) Ltd v Oriental Credit Ltd [1985] 2 Lloyd's Rep 546 (folld)

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (folld)

IE Contractors Ltd v Lloyd's Bank plc and Rafidain Bank [1990] 2 Lloyd's Rep 296 (refd)

Perry v National Provincial Bank of England [1910] 1 Ch 464 (folld)

Teknik Cekap Sdn Bhd v Public Bank Bhd [1995] 3 MLJ 449 (folld)

United Malayan Banking Corp v Datin Theresah bte Abdullah & Anor [1995] 1 AMR 304 (refd)

United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors [1987] 1 CLJ 50 (distd)

Union Bank of Manchester v Beech (1865) 159 ER 695 (folld)

Legislation referred to

Contracts Act 1950 s 87

Rules of the High Court 1980 O 18 r 19

ES Chuah and *MY Goh* (*Iza Ng Yeoh & Kit*) for the respondent/plaintiff.

Renu Zechariah (*Anad & Noraini*) for the appellant/defendant.

Cur Adv Vult

Kamalanathan Ratnam JC: The defendant filed an application to strike out the plaintiff's claim by way of encl 5. The learned senior assistant registrar dismissed the said application; hence this appeal before me.

Background facts

The plaintiff is the owner and developer of three middle-cost apartment blocks at Lot PT4, Jalan Berhala, Section 72, Wilayah Persekutuan ('the project'). Pembinaan Gedong Sdn Bhd ('Gedong') was engaged as turnkey

contractor and Ingeback (M) Sdn Bhd ('Ingeback') was engaged as the subcontractor for the project. The defendant entered into a performance bond on 14 December 1987 with the plaintiff and Gedong to guarantee the due performance of the said construction by Ingeback for the sum of RM29,849,443 ('the performance bond'). Based on this, Gedong entered into a building contract with Ingeback on 24 March 1988 for the construction of the project. Meanwhile, Gedong entered into a deed of assignment with the plaintiff on 28 June 1988 whereby Gedong absolutely assigned its rights to receive from the defendant, all monies payable under the performance bond. Ingeback however breached the provisions of the building contract and defaulted in its various obligations, the details of which need not be enumerated for the purposes of this appeal. Gedong therefore terminated the building contract by way of its letter dated 19 April 1990 ('the first breach'). The plaintiff and Gedong then by way of their solicitors' letter dated 23 April 1990 made a claim against the defendant on the performance bond.

On or around July 1990, Ingeback as plaintiff made an application through a writ of summons D5–22–1025–1990 ('1025–90 suit') to, inter alia, obtain an injunction to restrain the defendant from paying out on the performance bond without naming the plaintiff or Gedong as co-defendants. Such an order was granted on 6 July 1990. The plaintiff intervened in the 1025–90 suit for the purposes of dissolving the injunction and for claiming on the guarantee issued by the defendant. However, procedural objections to the said application to dissolve the injunction were taken by the defence and the said application was dismissed with liberty to refile. There was no further application. Subsequently, the 1025–90 suit was called up by this court on a show cause notice and Ingeback through the official receiver withdrew the said suit with the implied consent of the present plaintiff and Gedong (the intervenor).

In any event, even before this order was granted, Gedong and Ingeback had agreed by way of a letter dated 26 June 1990 (exh WTO-5 to encl 6) that both parties had expressed the wish to complete the project and with this in mind, Gedong had granted Ingeback an extension of time to complete the project. It was also agreed by the parties that:

> On the current position of insurance guarantee, termination letter and whatever legal actions both parties are considering taking should be put on hold and be reviewed by both parties at a later date.

To further cement their desire to complete the project, Gedong entered into an agreement dated 10 August 1990 with Ingeback ('the supplemental agreement') which agreement was supplemental to the building contract whereby, inter alia, Ingeback was allowed to recommence work in the project as subcontractors. In spite of extensions given, Ingeback was unable to complete the project and sought help from Gedong by way of its letter dated 12 June 1991 (exh WTO-6 to encl 6) to take over the management of the project up to completion. Accordingly, Ingeback ceased all further involvement in the project.

A However, their aforesaid breaches of contract had already caused a delay of more than one year to the project, thus incurring liability to Gedong as liquidated and ascertained damages under the building contract and the supplemental agreement amounting to RM4,087,532.90 as averred in encl 6. This has not been denied by Renu Zechariah who affirmed an affidavit on behalf of the defendant, in response to encl 6.
B

What must be satisfied in an application to strike out pleadings

It is trite law that only in plain and obvious cases may recourse be had to the summary process under O 18 r 19 of the Rules of the High Court 1980. This court will not go into a minute and protracted examination of
C the documents and the facts of the case in order to see whether the plaintiff has a cause of action. As long as the statement of claim discloses some cause of action or raise some question fit to be tried, the mere fact that the case is weak and not likely to succeed is no ground for striking out.

This application to strike out the plaintiff's claim is launched on two
D grounds, namely, (a) res judicata and estoppel; and (b) that the claim on the guarantee is bad as the guarantee had lapsed.

On the issue of estoppel, the defence submits that by consenting to the withdrawal of the 1025–90 suit which action is based on the same claim as the present suit, the plaintiff has relinquished its claim against the
E defendant and is therefore estopped from filing the same claim against the defendant by way of this present action.

The defendant contends that by entering into the supplemental agreement, the plaintiff had waived the first breach. Therefore, having waived the first breach and having reinstated Ingeback as the contractor,
F the demand on the guarantee for the first breach upon the defendant had lapsed. Since no further claim was made on the guarantee, the guarantee expired on 31 May 1990. It is obvious from the facts that Ingeback had defaulted again in their obligations under the supplemental agreement thereby committing a second breach. The defendant argues that if res judicata and estoppel do not apply, then the claim on the guarantee itself
G is bad as the guarantee had lapsed due to the plaintiff and Gedong waiving the breach by Ingeback and due to the guarantee expiring on 31 May 1990.

With regard to the plea of res judicata, the defendant relied on *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 wherein the Federal Court held that the parties are also prevented from
H asserting a cause of action or issue which should have been brought forward in the earlier action but was not, whether deliberately or inadvertently.

What is a performance bond

I Our appellate courts have had occasion over the past year to plumb the nature of such bonds over a series of decisions beginning with the Federal Court decision in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 where Peh Swee Chin FCJ said at p 156:

> It is obvious that the word 'bond' is a loose, general term, used also to include a group of documents or legal instruments such as a contract of guarantee, or of indemnity or an undertaking to pay. Any attributive word before the word 'bond' usually refers to the purpose of the bond such as tender bonds, performance bonds, etc. Performance bonds are almost invariably contracts of guarantee and so named presumably to give that extra air of solemnity.

In the present case, the defendant agreed to guarantee the due performance of the building contract. To my mind, this guarantee was indeed a performance bond as defined in *Esso Petroleum*. In the course of their judgment, the Federal Court referred to and approved of an article by Vincent Powell Smith entitled 'Calls on Performance Bonds in Malaysia — The Current Law' [1992] 2 MLJ i. In the said article, the learned author referred to the recent English Court of Appeal decision in *IE Contractors Ltd v Lloyd's Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 296 which held that a performance bond, like a letter of credit, will generally be found to be conditioned upon the presentation of one or more documents, and will not be conditioned upon the existence of facts which those documents assert. It further held that if that was the case, the bank must pay when the call was made unless there was established an obvious fraud.

The English Court of Appeal in the case of *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546 tackled this issue in the context of an undertaking in a performance bond which was as follows:

> We undertake to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance ... .

After summarizing the arguments of counsel for the defendant, Lord Ackner LJ rejected an interpretation of the said undertaking which required the bank which issued the performance bond to take upon itself the obligation of deciding the merits of the dispute as it was a function for which the bank was wholly unfitted and which the parties could not sensibly have intended. He went on to say that the absurdity of such an interpretation was clear in that:

> ... if the performance bond was so conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a competent court of jurisdiction and this result would be wholly inconsistent with the entire object of the transaction, namely to enable the beneficiary to obtain prompt and certain payment.

As such, the court found that the bank was not concerned in the least with the relation between the supplier and customer nor with the question whether the supplier was in default or not; the only exception being where there was clear evidence both of fraud and of the bank's knowledge of that fraud. Lord Ackner further held that in making the demand, the beneficiary only needed to inform the bank that he did so on the basis provided for in the performance bond itself.

Esal (Commodities) was followed and directly applied in *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449 wherein our Court of Appeal decided that the wording of the performance bond considered therein required the beneficiary to assert in substance, without the need to use the exact words as found in the performance bond, that there was a breach of contract. The bond in *Teknik Cekap* was as follows:

> If the subcontractor ... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder, then the guarantor shall pay ... .

Clause 2(i) of the performance bond in the instant case reads:

> If the contractor ... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder, then the guarantor will indemnify and pay the principal ... .

The said cl 2(i) is virtually identical to the one used in *Teknik Cekap* and is similar to the one used in *Esal (Commodities)*. As such, I hold that cl 2(i) of the instant case renders the performance bond an on-demand performance bond which is only conditional upon the beneficiary asserting the basis of the claim upon the issuer of the bond contending that there has been a breach of contract. I further find that upon such a demand being made, the liability of the defendant to pay under the performance bond is immediately attracted. I therefore reject the defendant's contention that the said letter only constitutes a mere notification and not a demand. In fact, referring to *Esso Petroleum*, Peh Swee Chin FCJ said at p 157:

> ... There was nothing there that could suggest that the demand was not proper, and for complying with the simple words there of making a claim by 'a demand in writing', the said letter was sufficiently compliant even though it was verbose.

The usage of the words 'notice of demand' in that letter was thus held not to derogate from the acceptability of the relevant letter as a demand. His Lordship also went on to adopt the principle that strict compliance was not necessary in the case of the demands on performance bonds. The liberality of their approach was illustrated when the Court of Appeal said at p 157:

> ... If words are in apparent conformity with the wording in any particular bond, they are sufficient.

Although the bond in *Esso Petroleum* was a pure on-demand bond, that difference is not material to this case because the only interpretative difference between a pure on-demand bond and a bond conditional only upon the assertion of a given state of facts, lies only in the need to make the said assertion. The test as to whether the letter dated 23 April 1990 is a good demand is the same no matter whether the bond is a pure on-demand or any other kind of performance bond.

As for the defendant's assertion that the guarantor must be given a reasonable time to meet the obligations, it is my finding that the defendant could have paid the monies so demanded by the letter dated 23 April 1990,

at any time after that and up till 6 July 1990 when the injunction to stop the defendant from paying out on the performance bond was granted to Ingeback. The defendant had more than two months to make payment but it did not do so.

It was also argued by the defendant that a letter of demand must, inter alia, also request the guarantor to pay within a specified time. It is my judgment that there is no necessity to request the guarantor in the letter of demand to pay within a specified time. Once a demand has been served, the beneficiary should give a reasonable time to the guarantor to meet the obligation. In fact, even the letter of demand in *Esso Petroleum* does not contain such a stipulation and the Federal Court found that letter of demand sufficient. The defendant's reliance on *United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 501 to support the argument that the letter ought to tell what the demand was about and what amount of payment the other defendants had to make, is totally flawed. I find as a fact that in the letter dated 23 April 1990, the plaintiff had in fact referred to the performance bond dated 14 December 1987 between the two parties and had explained that the defendant had agreed to guarantee the due performance of the contract by Ingeback, about the breach of Ingeback of the contract, and of the consequential termination. In fact, a copy of the letter of termination was even served on the defendant together with the said letter of demand. Further, the amount of the claim was specifically mentioned in the said letter. The case of *United Prime* can be distinguished from this case as it rests upon facts which are vastly different from the facts of the instant case. The plaintiff in that case did not serve any letter of demand on the defendants who were guarantors for United Prime Corporation for their obligation under an equipment lease agreement but merely sent a carbon copy of the letter of demand to United Prime Corporation.

Was the guarantee in respect of the first agreement or the supplemental agreement

The defendant raised the question as to whether the guarantee was in respect of the first agreement between the plaintiff and Gedong and Ingeback or whether it guaranteed the due performance of the supplemental agreement and submitted that the guarantee was for the due performance of the first agreement and not the supplemental agreement. The plaintiff in its submission took umbrage to the contention that there are two separate agreements. The supplemental agreement, said the plaintiff, was meant to supplement the terms of the building contract.

As can be seen from the statement of claim, the plaintiff is claiming from the defendant under the performance contract by way of its letter dated 23 April 1990 because of the breach by Ingeback, of the terms of the building contract which resulted in the termination of the contract by way of the letter dated 19 April 1990. The defendant has alleged that the breaches of the terms by Ingeback were waived by the plaintiff when the supplemental agreement was signed.

Was there a waiver

It must be borne in mind that the performance bond itself provides that the defendant is not discharged/released from the bond by the reinstatement of Ingeback as the subcontractor for the project. The exact words of cl 2(ii), inter alia, reads:

> (ii) The guarantor shall not be discharged or released from this guarantee by any arrangement between the contractor and the principal with or without the consent of the guarantor or by any alteration in the obligations undertaken by the contractor or by any forbearance whether as to payment, time, performance or otherwise, but the guarantor shall be entitled to be informed of such arrangement or alterations.

Clearly, the word 'arrangement' in cl 2(ii) of the bond must mean a discharge of the liabilities of a debtor to his creditor by some partial performance of the original contract. The supplemental agreement provides that Ingeback may resume work on the project with new completion dates and it was also agreed that the block of low-cost apartments be excluded from the scope of the building agreement. I shall deal with the issue of waiver later. But even assuming for a moment that the supplemental agreement was a waiver of the earlier breaches by Ingeback, it would seem that Gedong and Ingeback have now entered into an arrangement whereby the previous breaches by Ingeback to Gedong are thereby discharged in return for partial performance of the building contract according to the new terms as promulgated by the supplemental agreement. Therefore, even if the supplemental agreement constitutes a waiver of Ingeback's breaches by Gedong, cl 2(ii) of the performance bond provides that although Ingeback may be so discharged from its liability, the defendant's liability for the aforesaid breaches as a result of the demand letter dated 23 April 1990 still remains and the defendant has thus far failed to pay up. In any event, the contract was not performed by Ingeback, as it turned out. It is perfectly possible for a surety to enter into a contract with a creditor in the guarantee document that notwithstanding any composition, release, forbearance or arrangement, the surety shall remain liable although the principal does not. The train of authorities supporting this proposition began with the decision of the English Court of Exchequer in *Cowper v Smith* (1838) 150 ER 1534. Here, the defendant entered into a guarantee with the plaintiff for goods to be supplied by the plaintiff to a person named Green. The guarantee provided, inter alia, that the plaintiff could grant to Green and the persons liable upon such bills, notes or securities, any indulgence, and to compound with him or them respectively, as the plaintiff might think fit, without the same discharging or in any manner affecting the liability of the defendant, by virtue of the guarantee. The plaintiff later became parties to a deed of composition with Green and its creditors wherein Green assigned all his stock in trade to his creditors and in consideration thereof, the plaintiff released Green from all his debts to him. It was the decision of the court that as the surety had expressly contracted to remain liable, notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal was an implied discharge of the surety. *Cowper* was followed and applied in *Union*

Bank of Manchester v Beech (1865) 159 ER 695 where the surety guaranteed the payment of a bank account and agreed, inter alia, that no composition with the principal debtor would discharge the liability of the surety notwithstanding any objection or protest by the surety against the making of such an arrangement. Subsequently, the principal debtor entered into a deed of arrangement for the benefit of his creditors, whereby he assigned to them all his property to apply for the benefit of the creditors in like manner as if he had been adjudged a bankrupt. The court held that such an arrangement was an absolute release, that there was substantially no difference between a composition and a release and applied *Cowper* in deciding that the surety had expressly agreed in the guarantee that a composition would not discharge him from liability to the plaintiff.

The English Court of Appeal had affirmed the aforesaid authorities in the case of *Perry v National Provincial Bank of England* [1910] 1 Ch 464. In that case, the terms of the mortgage deeds entered into by the plaintiff surety for the benefit of the bank as security for moneys owing to the bank by the principal debtor provided that:

> ... the bank shall be at liberty without *thereby affecting their rights herein* at any time to determine or vary any credit to the debtors or any of them to vary, exchange or release any other securities ... and to compound with, give time for payment of, and accept compositions from and make any other arrangements with the debtors ... . (Emphasis added.)

The principal debtor ran into serious financial problems and entered into an arrangement whereby all of the completed properties of the said debtor would be acquired by a newly formed company which would issue debenture stock to creditors in full satisfaction of the debts of the debtor. The shares of the company would only be issued to the debtor upon the full payment of the debentures. Accordingly, the bank entered into the arrangement and was allotted debenture stock. However, the company was unsuccessful in paying the interest on the debenture stock and the bank threatened to sell the properties which had earlier been mortgaged to them by the surety. The debtor sued for a declaration that nothing was due on the mortgages on the basis that the liability of the surety under the mortgages had been discharged by the release of the principal debtor.

Lord Cozens-Hardy MR said at p 471:

> ... It is important to distinguish clearly between the rights of a surety under an ordinary contract of suretyship not containing any special provisions and the rights of a surety where the instrument creating the suretyship contains special clauses. It is elementary law that in a simple case of principal and surety, the surety is discharged if the creditor gives time to the principal or does certain other acts; and, a fortiori, if the creditor releases the principal debtor, of course the surety is released too. There are a certain number of acts which will not release the surety if, when the act in question is done, there is a reservation of rights against the surety. A common instance of this is giving time. When you find in the instrument of suretyship itself a provision that the surety shall be liable notwithstanding certain acts being done by the creditor which would otherwise release him, these doctrines have no application at all. It is not then a simple contract of suretyship. It

A is true that in one sense, it is a contract of suretyship, but it is a contract of suretyship containing special clauses which deliberately exclude certain rights which the surety would otherwise have had.

The Master of the Rolls went on to apply the decisions in *Cowper* and *Union Bank* and held as follows at p 475:

B ... The surety had himself contracted that the rights under the deed should not be affected by any such arrangement; and, that being so, it seems to me that though there is no personal liability on the part of Perry Brothers to the bank, yet as regards this 1630*l*. This is part of the liability of Perry Brothers secured by the mortgage and is within the meaning of the deed something for which the surety is still liable to the bank notwithstanding the release of C the debtor.

In *Commercial Bank of Tasmania v Jones* [1893] AC 313, the Privy Council gave a decision which ran counter to the views of the Master of the Rolls in *Perry*. The facts of the case were that B had guaranteed the debts of W for the benefit of the bank. The guarantee provided that the appellants D might at any time compound with W for the whole or any part of his or their liabilities to the appellants and that no such composition, granting of time, taking of security, release, discharge, or arrangement, should have the effect of releasing or in any way affecting B's liability under the guarantee. W in the meantime had conveyed to the bank property as security. In 1889, W owed the bank £2,400 and entered into an agreement E with M to convey to him the properties subject to the mortgage. The bank accordingly agreed that W's liability to the bank should be transferred to M, and that the properties be reconveyed by the bank back to W so that W could convey the properties to M who would then mortgage them to the bank for the amount due. The bank agreed to accept M as debtor instead F of W. B died before he could give a guarantee to the bank in respect of M. The court held that where there is an absolute release of the principal debtor, the remedy against the surety B is gone and where such release is given, no right can be reserved because the debt is satisfied and completely novated. To my mind, the facts of *Commercial Bank of Tasmania* differ markedly from the facts of the instant case. The creditor in that case G accepted a third party in the place of the debtor and as such, constituted a complete novation of the debt. There is nothing of that sort in the case before me.

In any event, the decision in *Commercial Bank of Tasmania* was not followed by the Court of Appeal in *Perry*. Fletcher-Moulton LJ, in strongly H disapproving of that decision, said at p 476:

... I confess I do not quite understand the language that is used. If it means that in an ordinary contract of pure suretyship the consequences enumerated follow, it is only a statement of obvious and uncontested law, and this accounts for the learned Lord speaking of it as being settled law. If the I meaning is that it is impossible to make a legal contract which would have certain legal effects, we cannot accept such law. It would be in conflict with the law laid down by the Court of Exchequer in the two cases to which the Master of the Rolls has referred and which were not cited in the case before the Privy Council. Moreover, it would be quite meaningless. People can

> contract to do anything. All that it would amount to would be that if it was a contract which had those legal consequences, it could not properly be called a contract of suretyship.

Accordingly, Fletcher-Moulton LJ restricted *Commercial Bank of Tasmania* (a decision which was not binding on the Court of Appeal and also not binding on me) to its facts and to the 'normal contract of suretyship' and interpreted the decision as instead as resulting from the failure of counsel on behalf of the bank in *Commercial Bank of Tasmania* to convince the Privy Council that the case fell within the special clauses of their contract.

In the case before me, it is my judgment that the liability of the defendant had already accrued since 23 April 1990 when the letter of demand was issued and the breach was in the end not remedied by the defendant, notwithstanding the supplemental agreement.

The decision in *Perry* was subsequently followed by the High Court of Australia being the highest appellate court in the case of *Bank of Adelaide v Lorden* (1971–72) 127 CLR 185. The terms of the guarantee instrument in the *Bank of Adelaide* were similar to that of the case before me. Barwick CJ held that the surety might agree in advance to remain liable though the debt of the principal debtor be discharged by other means than payment as, for example, by composition. The learned Chief Justice went on to apply the decision in *Perry* to the facts of the case before him and held that the liability of the surety remained though the debt of the principal debtor has been discharged otherwise than by payment in full. There is no doubt that the position is the same in Malaysia. It is my finding that a release of the principal debtor by the creditor will not discharge the surety if he has expressly agreed to remain liable, so that there is then no ground for the presumption that he is impliedly discharged. Notwithstanding the fact that s 87 of the Contracts Act 1950 states that a surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor, yet in practice, the effect of this section is rendered nugatory by the use of other clauses designed to preserve the surety's liability despite the release of the principal debtor in contracts or guarantee (see para [87] of *The Annotated Statutes of Malaysia — Contracts Act 1950*).

In the circumstances, it is my judgment that the decision in *Perry* is sound law and I therefore adopt the ruling therein. As a result, the entry of Ingeback and Gedong into the supplemental agreement does not constitute a waive which would entitle the defendant to escape liability under the performance bond.

Supplemental agreement is not a waiver of Ingeback's breach of contract

It is my finding that the plaintiff has not by way of the supplemental agreement waived the breach by Ingeback. The supplemental agreement is between Ingeback and Gedong. The plaintiff is not a party to the supplemental agreement. Gedong had, on 28 June 1988, that is, long before the date of the execution of the supplemental agreement which was on 10 August 1990, assigned its rights under the performance bond to the

plaintiff. The said assignment had been consented to expressly by the defendant on 4 July 1988 (encl 6 exh WTO-4). It is therefore not true to contend that the plaintiff entered into the supplemental agreement. As such, the terms thereof should not bind the plaintiff and having divested itself beneficially of the right to claim under the performance bond, Gedong's acts cannot possibly affect the right of the plaintiff to claim under the performance bond from the defendant. In addition, the terms of the supplemental agreement itself show that there is no waiver of the breach. Clause 2 of the said agreement provides that there has been a dispute between the parties and that the parties intend to resolve such dispute by entering into the said supplemental agreement. The terms do not expressly state that the breach by Ingeback has been waived by Gedong at all. In any event, the supplemental agreement was not a waiver of Ingeback's breach by whatever party. The parties had agreed to withhold legal action until the completion of the project for the sake of the project, and any legal action could be resumed after the completion of the project.

Res judicata/estoppel not applicable

The defendant argued that the doctrine of res judicata in its wider sense ought to have been applied in this case and that it was an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. See *Asia Commercial Finance*. In the present case, the plaintiff and Gedong had intervened successfully in the 1025–90 suit and were ready to proceed with the application for dissolution of the injunction and for an order that the injuncted money be paid out to them. However, the defendant raised a procedural objection in the 1925–90 suit in that before the plaintiff and Gedong proceeded to dissolve the injunction obtained by Ingeback against the defendant, the plaintiff and Gedong must first file a cause of action against the defendant in the 1025–90 suit and that the defendant be allowed to file a defence to that cause of action. It was a fact that the plaintiff had not filed a claim against the defendant in the 1025–90 suit. When counsel for the official receiver acting for Ingeback withdrew the 1025–90 suit, the defendant herein contends that present plaintiff consented to the withdrawal whereas the plaintiff contends that it merely made no objections to the said request to withdraw the suit. On this basis, the defendant argues that res judicata has set in and therefore the plaintiff is estopped from filing this suit.

It must be noted that the only reason why the plaintiff applied to intervene in the 1025–90 suit in the first place was because the injunction obtained by Ingeback in the absence of the plaintiff and Gedong in effect prohibited the plaintiff and Gedong from proceeding against the defendant to claim under the performance bond unless and until the said injunction was set aside.

In any event, even if the plaintiff had consented to the official receiver withdrawing the earlier suit and I find that this is indeed so, the *Supreme Court Practice* (Malaysian Edition) 1996 Reprint Vol 1 at para 21/2–5/13 states:

> The discontinuance of an action or the withdrawal of part of a claim without leave is no bar to a subsequent action for the same cause of action (*The Kronprinz* (1887) 12 App Cas 256, where the distinction between discontinuance and dismissal is pointed out at p 259). The effect is the same where the discontinuance is with leave, unless the order giving the leave expressly prohibits the commencement of a fresh action (ibid, at p 262).
>
> The plaintiff may therefore commence a new action for the same cause, to which such discontinuance will be no defence; but unless he does so in good time, his laches may be a bar (*Reid v London & N Staffs Insce Co* 49 LT 468).

The plaintiff herein filed this present suit five days after the withdrawal of the 1025–90 suit. As such, laches is not an issue. Further, this court did not prohibit the plaintiff from filing afresh. Further, I am guided by the decision of my learned brother, Low Hop Bing JC (as he then was) in *United Malayan Banking Corp v Datin Theresah bte Abdullah & Anor* [1995] 1 AMR 304 at p 310 wherein he held that a plaintiff is able to elect to proceed with a new legal suit and to instead not proceed or to abandon the previous suit.

In any case, it is crystal clear that the merits of the plaintiff's claim were never considered and decided upon by the court in the earlier suit and that there was never a final decision in respect of the merits of the plaintiff's case against the defendant. In fact, the very case relied on by the defendant, namely, *Asia Commercial* affirms this point. The court in that case defined the doctrine of res judicata as 'a matter adjudged' and the rationale of the doctrine is that it creates an estoppel per rem judicatum. In other words, when 'a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth' (per Peh Swee Chin FCJ at p 197).

It is evident therefore that the existence of a previous judgment is the very essence, and sine qua non of the doctrine of res judicata. Without a previous judgment on the merits of the cause of action or issue, there is simply no res judicata, for 'res' simply means 'a thing' and 'judicata' means 'adjudicated'. Having held that res judicata cannot apply to the instant case, it follows therefore that the plea of estoppel must perforce equally fail.

In all the circumstances and having considered every issue raised by the appellant, I dismissed the appeal with costs.

Appeal dismissed.

Reported by Jafisah Jaafar